

Exhibit A to Design-Build Contract
General Conditions of Design-Build Contract

Table of Contents

Article 1 General1

Article 2 Design-Builder’s Services and Responsibilities4

Article 3 Developer’s Services and Responsibilities11

Article 4 Hazardous Environmental Conditions and Differing Site Conditions.....13

Article 5 Insurance and Bonds16

Article 6 Payment.....17

Article 7 Indemnification20

Article 8 Time23

Article 9 Changes to the Contract Price and Time.....24

Article 10 Contract Adjustments and Disputes26

Article 11 Stop Work and Termination for Cause27

Article 12 Miscellaneous30

Article 1 General

1.1 Mutual Obligations

1.1.1 Developer and Design-Builder commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

1.2 Basic Definitions

1.2.1 For the purposes of the Contract Documents, the following words and terms shall have the meanings specified below (other words and abbreviations that have well-known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings), provided, however, that capitalized terms defined in other Contract Documents, including but not limited to the Agreement, shall have the meanings specified in such document.

.1 *Agreement* refers to the executed lump sum Design-Build Contract Between Developer and Design-Builder.

.2 *Agreement Date* is the date that the Agreement is executed by both parties.

.3 *Business Day(s)*, whether capitalized or not, means any day(s) other than a Saturday, Sunday, Commonwealth of Virginia holiday, or a day when the New York Stock Exchange or banks are authorized or required to close in New York, New York or Richmond, Virginia.

.4 *Contract Documents* refer to those documents identified in Article 2 of the Agreement.

.5 *Contractor* shall mean Design-Builder.

.6 *Day* or *Days*, whether capitalized or not, shall mean calendar days unless otherwise specifically noted in the Contract Documents.

.7 *Developer's Project Criteria* are developed by or for the Developer to describe the Developer's program requirements and objectives for the Project, including use, space, price, time, site and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Design-Build Work.

.8 *Design-Build Work* is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

.9 *Design Consultant* is a qualified, licensed design professional, eligible to provide professional engineering and/or land surveying services in the Commonwealth of Virginia, who

is not an employee of Design-Builder, but is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder or Subcontractor, to furnish design services required under the Contract Documents.

.10 *Final Acceptance* is achieved when the Design-Builder receives written notice the Developer has acknowledged that the Design-Build Work is finally complete as set forth in Section 6.6 below.

.11 *General Conditions of Contract (or General Conditions)* refer to this document.

.12 *Governmental Approval* means any authorization, consent, approval, license, lease, ruling, permit, certification, exemption, or registration by or with any Governmental Unit.

.13 *Governmental Unit* means any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other entity having jurisdiction over the performance of the Design-Build Work, the Project or the Parties; provided, however, that the term “Governmental Unit” shall not be construed to include the Department.

.14 *Hazardous Environmental Condition* means the presence at the Site of Hazardous Materials in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto on connection with the Design-Build Work.

.15 *Hazardous Materials* are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements, including Hazardous Waste.

.16 *Hazardous Waste* means a waste that is: (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33; or (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by the Legal Requirements.

.17 *Interim Milestone(s)* is completion and delivery date(s) for parts of the Design-Build Work specified by the Contract Documents.

.18 *Known Pre-Existing Hazardous Materials* means Hazardous Materials identified in Exhibit R to the Comprehensive Agreement.

.19 *Legal Requirements* are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any Governmental Unit.

.20 *Pre-Existing Hazardous Materials* means Known Pre-Existing Hazardous Materials and Unknown Pre-Existing Hazardous Materials.

.21 *QA Manager (QAM)* is Design-Builder’s designee who shall be from an independent firm that has no involvement in construction operations for the Project, and shall be

responsible for the quality assurance (QA) inspection and testing of all materials used and Design-Build Work performed on the Project, to include monitoring of the contractor's quality control (QC) program. The QAM will ensure that all work and materials, testing, and sampling are performed in conformance with the contract requirements, and the "approved for construction" plans and specifications. This individual shall be a registered, licensed, Professional Engineer in the Commonwealth of Virginia.

.22 *QA/QC Plan* is a plan that details how the Design-Builder will provide quality assurance (QA) and quality control (QC) for both the design and construction elements of the project, obtain samples for Design-Builder quality control testing, perform tests for Design-Builder quality control, provide inspection, and exercise management control (e.g. quality assurance testing) to ensure the work conforms to the Contract Documents.

.23 *Remedial Actions* means the management, treatment, handling, storage, monitoring, removal, transport or disposal measures carried out by Design-Builder with respect to Hazardous Materials in accordance with Section 4.1.1.2 of the General Conditions of Contract.

.24 *Remedial Action Plan* means the plan developed by Design-Builder with respect to Hazardous Materials encountered by Design-Builder.

.25 *Separate Contractor* means a contractor retained by the Developer other than the Design-Builder to perform work or to provide services or materials in connection with the Project.

.26 *Site* is the land or premises on which the Project is located.

.27 *Standard Drawings* are the applicable drawings in the Virginia Department of Transportation *Road and Bridge Standards* in effect as of the Agreement Date.

.28 *Standard Specifications* are the Virginia Department of Transportation *Road and Bridge Specifications* in effect as of the Agreement Date.

.29 *State* means the Commonwealth of Virginia.

.30 *State Highway* means any highway designated a State Highway pursuant to Title 33.2, Chapter 3, Code of Virginia.

.31 *State Indemnitee* means and includes the Department, the Commissioner, the Commonwealth Transportation Board, the State and all elected representatives, appointed officials, commissioners, officers, members, employees, authorized agents and authorized representatives of any of them.

.32 *Subcontract* means any and all agreements between Design-Builder and its Design Consultants, Subcontractors and other agreements between Design Consultants or Subcontractors and their respective Sub-subcontractors (and/or any other lower tier

subcontractors), it being the intent that all this term encompasses all agreements deriving directly or indirectly from Design-Builder, in connection with the performance of the Design-Build Work.

.33 *Subcontractor* is any person or entity retained by Design-Builder as an independent contractor to perform a portion of the Design-Build Work and shall include materialmen and suppliers, but shall not be deemed to include Design Consultants.

.34 *Sub-Subcontractor* is any person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Design-Build Work and shall include materialmen and suppliers, but shall not be deemed to include Design Consultants.

.35 *Unknown Pre-Existing Hazardous Materials* means any Hazardous Materials present on the Site prior to the Agreement Date which are not Known Pre-Existing Hazardous Materials.

.36 *Work Breakdown Structure (WBS)* is a hierarchically-structured grouping of project elements that organizes and defines the total scope of the Project. Each descending level is an increasingly detailed definition of a project component. Project components may be products (a product-oriented WBS) or tasks (a task-oriented WBS).

.37 *Work Package* is a deliverable at the lowest level of the WBS, and may be divided into activities and used to identify and control work flows in the organization.

Article 2 **Design-Builder's Services and Responsibilities**

2.1 General

2.1.1 Design-Builder's Representative shall be reasonably available and shall have the necessary expertise and experience required to supervise the Design-Build Work. Design-Builder's Representative shall communicate regularly with Developer and shall be vested with the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced only by the mutual agreement of Developer and Design-Builder.

2.1.2 Design-Builder will attend a kick-off meeting to discuss issues affecting the administration of the Design-Build Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents. Developer will notify Design-Builder of the time and location of the kick-off meeting. All Key Personnel shall participate in this kick-off meeting.

2.1.3 Design-Builder shall provide Developer with the Preliminary Schedule, Baseline Schedule, Schedule Updates, Schedule Revisions, monthly reports and Final As-Built Schedule set forth in Section 11.1 of the Agreement.

2.1.4 If Design-Builder wishes to deviate from the right-of-way limits shown in the Technical Requirements [***Per Dusty – Confirm with Technical Team that ROW limits are shown in the TRs***], such deviations will be subject to Developer’s and the Department’s prior written approval. It will be the responsibility of Design-Builder to coordinate directly with the affected property owners to acquire such right-of-way.

2.1.5 Design-Builder shall submit its QA/QC Plan to Developer for review and approval at the kick-off meeting referenced in Section 2.1.2 above. At the kick-off meeting, Design-Builder’s Design Manager and QA Manager shall provide a presentation of the QA/QC Plan for design and construction, using project-related scenarios

2.1.6 Design-Builder shall coordinate and lead all monthly progress meetings. During such meetings, progress during the prior month shall be reviewed. Design-Builder shall collect information from Design Consultants and any key Subcontractors responsible for work completed during the specified duration and work scheduled during the upcoming reporting duration. The monthly meetings shall be attended by all Key Personnel, as well as any other individuals that Developer may require. Meetings will occur monthly beginning the month after Design-Builder’s receipt of Developer’s Notice to Proceed. Design-Builder shall be responsible for preparing, maintaining and distributing minutes of the meetings to all attendees for review. The meeting minutes shall be provided to the Developer within [•] ([•]) days of the monthly progress meeting.

2.1.7 Design-Builder shall perform the Design-Build Work in accordance with: (a) the Contract Documents; (b) applicable Legal Requirements and Governmental Approvals; and (c) the degree of skill and judgment prevailing on the Agreement Date that is expected to be exercised by prudent, skilled and experienced contractors and design professionals on similar projects in the Commonwealth of Virginia, taking into consideration safety, operational requirements, level of service, and life cycle costs. Notwithstanding the above, if any of (a), (b) or (c) in the preceding sentence conflict, Design-Builder shall be obligated to perform the Design-Build Work in accordance with the more stringent standard.

2.2 Scope Validation and Identification of Scope Issues

[RESERVED]

2.3 Design Professional Services

2.3.1 Design-Builder shall, consistent with applicable state licensing laws, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering, surveying, and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Design-Build Work consistent with the Contract Documents. All design professional services shall be performed by professionals properly licensed in the Commonwealth of Virginia and who are well-versed in the Department’s design standards and practices.

2.3.2 No Design Consultant is intended to be, nor shall any Design Consultant be deemed to be, a third-party beneficiary of this Agreement. Developer and the Department are intended to be and shall be deemed third-party beneficiaries of all contracts between Design-Builder and any Design Consultant. In the event that this Agreement is terminated, Design-Builder shall, upon the written demand of Developer, assign such contracts to Developer.

2.3.3 Design-Builder shall incorporate all obligations and understandings of the Contract Documents applicable to design services in its respective contracts with any Design Consultant, and require that such obligations be flowed down to lower-tiered Design Consultants, including the obligations relative to ownership of the Work Product set forth in Article 4 of the Agreement.

2.4 Design Development Services

2.4.1 Design-Builder shall be responsible for the professional quality, technical accuracy, timely completion and coordination of all drawings, specifications and other design submissions required to be developed by Design-Builder under the Contract Documents and shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in such design submissions.

2.4.2 Design-Builder shall, consistent with any applicable provision of the Contract Documents, provide Developer with [•] sets of the following interim design submissions, in accordance with the Technical Requirements. The submissions should generally correspond to the Department's concurrent engineering process, including but not limited to: (i) Preliminary Field Inspection (PFI); (ii) Field Inspection and Right-of-Way (FI/RW); and (iii) additional interim design submissions that Developer or the Department may require. On or about the time of the scheduled submissions, Design-Builder and Developer shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Developer shall review and provide comments on the interim design submissions (except that it will specifically approve or disapprove of the FI/RW submissions) within [•] days after receipt of the required submissions. Design-Builder shall promptly revise and modify all such submittals so as to fully reflect all comments and shall deliver to Developer revised submittals for review and comment (and approval as the case may be).

2.4.3 Design-Builder shall submit to Developer Construction Documents setting forth in detail drawings and specifications describing the requirements for construction and QA/QC activities associated with such Design-Build Work, in full compliance with the Contract Documents and all Legal Requirements and Governmental Approvals. The Construction Documents shall be consistent with the latest set of interim design submissions; as such submissions may have been modified in a design review meeting, as agreed upon in writing, and shall be submitted after Design-Builder has obtained all requisite Governmental Approvals associated with the Design-Build Work contained in such documents. The parties shall have a design review meeting to discuss, and Developer shall review and approve, the Construction Documents in accordance

with the procedures set forth Section 2.4.1 above. Design-Builder shall proceed with construction in accordance with the approved Released for Construction Documents and shall submit the approved Released for Construction Documents to Developer and the Department prior to commencement of Design-Build Work in accordance with the Technical Requirements.

2.4.4 Developer's and/or the Department's review, comment and/or approval of interim design submissions and the Construction Documents are for the purpose of establishing Design-Builder's compliance with the requirements of the Contract Documents and mutually establishing a conformed set of Contract Documents compatible with the requirements of the Design-Build Work. Neither Developer's and/or the Department's review, comment and/or approval of any interim or final design submission (including but not limited to the Construction Documents) shall be deemed to transfer any liability from Design-Builder to Developer and/or Department.

2.4.5 To the extent not prohibited by the Contract Documents or Legal Requirements, Design-Builder may, with the prior agreement of Developer, prepare design submittals and Construction Documents for a portion of the Design-Build Work to permit procurement and construction to proceed on that portion of the Design-Build Work prior to completion of the Construction Documents for the entire Design-Build Work.

2.5 Legal Requirements

2.5.1 Design-Builder shall keep fully informed of and perform the Design-Build Work in accordance with all Legal Requirements. Design-Builder shall provide all notices, and execute and file the documents, statements and/or affidavits applicable to the Design-Build Work as required by the Legal Requirements. Design-Builder shall permit Developer's examination of any records made subject to such examination by any applicable Legal Requirements.

2.6 Governmental Approvals

2.6.1 Design-Builder shall obtain and pay for all necessary Governmental Approvals required for the prosecution of the Design-Build Work by any Governmental Unit. If any such Governmental Approval is required to be formally issued in the name of Developer or the Department, Design-Builder shall undertake all efforts to obtain such Governmental Approvals subject to Developer's and/or the Department's reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in forms approved by Department. Design-Builder shall deliver to Developer, promptly after Design-Builder's receipt, a copy of each such Governmental Approval, with a listing of the status of all such Governmental Approvals included in the monthly reports required by Section 11.1 of the Agreement.

2.6.2 Design-Builder shall provide reasonable assistance in obtaining those Governmental Approvals that are Developer's or the Department's responsibility pursuant to Section 8.06 of the Comprehensive Agreement, and no construction activity will commence until: (i) all Governmental Approvals required for the relevant construction activity (including any activity that may disturb the Site) have been obtained; (ii) Developer has been notified that such

Governmental Approvals have been obtained; and (iii) Developer has, after reviewing the validity and scope of the Governmental Approval, authorized Design-Builder to proceed.

2.6.3 Design-Builder shall ensure that the Design-Build Work conforms to the requirements and stipulations of all Governmental Approvals. Any violations of or noncompliance with any Governmental Approval, including but not limited to suspensions caused by Design-Builder violating or not being in compliance with a Governmental Approval, shall be at the sole risk of Design-Builder, and shall not be a basis for adjusting the Contract Price and/or Contract Time(s).

2.7 Design-Builder's Construction Phase Services

2.7.1 Unless otherwise provided in the Contract Documents to be the responsibility of Developer or a Separate Contractor, Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project consistent with the Contract Documents.

2.7.2 Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents, and shall maintain or cause to be maintained all licenses required of the Design-Builder or its employees in connection with the Design-Build Work. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

2.7.3 Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Design-Build Work lawfully in the Commonwealth of Virginia and consistent with the Contract Documents. Design-Builder shall not use any Subcontractor to whom the Developer has a reasonable objection, and shall obtain Developer's written consent before making any substitutions or additions to Subcontractors previously identified to Developer as being members of Design-Builder's Project team.

2.7.4 Design-Builder assumes responsibility to Developer for the proper performance of the Design-Build Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Developer or the Department and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights on the part of any Subcontractor or Sub-subcontractor.

2.7.5 Design-Builder shall coordinate the activities of all Subcontractors. If Developer or the Department performs other work on the Project or at the Site with Separate Contractors under Department's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of such Separate Contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

2.7.6 Design-Builder shall keep the Site reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas, as set forth in the Technical

Requirements. Upon Final Acceptance of the Design-Build Work, or a portion of the Design-Build Work, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Design-Build Work or applicable portions thereof to permit occupancy of the Project or a portion of the Project for its intended use.

2.7.7 Design-Builder shall be responsible for the security of the Site until Final Acceptance of the Design-Build Work, or a portion of the Design-Build Work.

2.8 Design-Builder's Responsibility for Project Safety

2.8.1 Design-Builder recognizes the importance of performing the Design-Build Work in a safe manner so as to prevent damage, injury or loss to: (i) all individuals at the Site, whether working or visiting; (ii) the Design-Build Work, including materials and equipment incorporated into the Design-Build Work or stored on-Site or off-Site; and (iii) all other property at the Site or adjacent thereto. Design-Builder assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Design-Build Work. Design-Builder shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Design-Build Work. Unless otherwise required by the Contract Documents, Design-Builder's Safety Representative shall be an individual stationed at the Site who may have responsibilities on the Project in addition to safety. The Safety Representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable. Design-Builder shall provide minutes of each safety meeting to Developer within five (5) days of such meeting.

2.8.2 Design-Builder shall provide, for Developer's review, comment and acceptance, a Health, Safety and Welfare (HS&W) plan on or before the earlier of fifteen (15) days of Design-Builder's receipt of Developer's Notice to Proceed, or twenty-one (21) days before Design-Builder intends to commence any construction-related activities at the Site. Design-Builder shall not perform any construction-related activity (including any activity that disturbs the Site) until an acceptable HS&W plan is in place.

2.8.3 Design-Builder and Subcontractors shall comply with: (i) all Legal Requirements relating to safety; (ii) Design-Builder's HS&W plan; and (iii) any Department-specific safety requirements set forth in the Contract Documents, provided that such Department-specific requirements do not violate any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Design-Build Work to Developer's Representative and, to the extent mandated by Legal Requirements, to all Governmental Units having jurisdiction over safety-related matters involving the Project or the Design-Build Work.

2.8.4 Developer shall have the right to immediately suspend any or all Design-Build Work if Design-Builder fails to comply with its obligations hereunder.

2.8.5 Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for: (i) complying with all Legal Requirements, including those related to health and safety matters; and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, losses, damages or accidents resulting from their performance of the Design-Build Work.

2.9 Design-Builder's Warranty

2.9.1 Design-Builder warrants that the Design-Build Work, including both the design services and construction services, will be complete and conforms to the Contract Documents and Good Industry Practice. Design-Builder further warrants that the Design-Build Work, including all materials and equipment furnished as part of the construction, will be new unless otherwise specified in the Contract Documents, of good quality, and free of defects in materials and workmanship. Nothing in this warranty is intended to limit any manufacturer's warranty which provides greater warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Developer with all manufacturers' warranties upon Final Acceptance.

2.10 Correction of Defective Design-Build Work

2.10.1 Design-Builder agrees to correct any Design-Build Work that is found to not be in conformance with the Contract Documents, including that part of the Design-Build Work subject to Section 2.9 hereof, within a period of 60 months from the date of Final Acceptance of the Design-Build Work or any portion of the Design-Build Work, or within such longer period to the extent required by the Contract Documents or applicable Legal Requirements or Government Approvals.

2.10.2 Design-Builder shall, within [•] days of receipt of written notice from Developer or the QA Manager that the Design-Build Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Design-Build Work, including the correction, removal or replacement of the nonconforming Design-Build Work and any damage caused to other parts of the Design-Build Work affected by the nonconforming Design-Build Work. If Design-Builder fails to commence the necessary steps within such [•] period, Developer, in addition to any other remedies provided under the Contract Documents, may provide Design-Builder with written notice that Developer will commence correction of such nonconforming Design-Build Work with its own forces. If Developer does perform such corrective Design-Build Work, Design-Builder shall be responsible for all reasonable costs incurred by Developer in performing such correction. If the nonconforming Design-Build Work creates an emergency requiring an immediate response, the [•] periods identified herein shall be deemed inapplicable.

2.10.3 The 60-month period referenced in Section 2.10.1 above applies only to Design-Builder's obligation to correct nonconforming Design-Build Work and is not intended to constitute a

period of limitations for any other rights or remedies Developer may have regarding Design-Builder's other obligations under the Contract Documents.

2.11 Developer's Rights to Direct Design-Builder

2.11.1 When any act, omission, or other action of Design-Builder occurs that violates the requirements, conditions, or terms of the Contract Documents; or affects the health, safety, or welfare of the public or natural resources, Developer will have the right, but not the obligation, to direct Design-Builder to take prompt action to repair, replace, or restore the damage or injury within a time frame established by Developer. If Design-Builder fails to make such repair, replacement, or restoration within the established time frame, Developer will have the damage or injury repaired, replaced, or restored and will deduct the cost of such repair, replacement, or restoration (plus 25% for supervisory and administrative personnel costs) from monies due Design-Builder.

Article 3 **Developer's Services and Responsibilities**

3.1 Duty to Cooperate

3.1.1 Developer shall, throughout the performance of the Design-Build Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Design-Build Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

3.1.2 Developer shall provide timely reviews and (where required) approvals of submittals, interim design submissions and Construction Documents consistent with the turnaround times set forth in Design-Builder's schedule, provided, however that, unless stated otherwise in the Contract Documents, Developer shall have twenty-one (21) days after receipt of such submissions to act upon such submissions. This Section 3.1.2 shall not be construed to apply to the acquisition of Governmental Approvals by either the Design-Builder or the Developer.

3.1.3 Developer's Representative will participate in monthly progress meetings for the duration of the Project.

3.2 Financial Information

3.2.1 At Design-Builder's request, Developer shall promptly furnish reasonable evidence satisfactory to Design-Builder that Developer has adequate funds available and committed to fulfill all of Developer's contractual obligations under the Contract Documents. If Developer fails to furnish such financial information in a timely manner, Design-Builder may stop Design-Build Work under Section 11.3 hereof or exercise any other right permitted under the Contract Documents.

3.2.2 Design-Builder shall cooperate with the reasonable requirements of Developer's lenders or other financial sources. Notwithstanding the preceding sentence, after the Agreement Date, Design-Builder shall have no obligation to execute for Developer or Developer's lenders or other financial sources any documents or agreements that require Design-Builder to assume obligations or responsibilities greater than those existing obligations Design-Builder has under the Contract Documents.

3.3 Developer's Representative

3.3.1 Developer's Representative shall be responsible for providing Developer-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Developer's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Design-Build Work.

3.4 Governmental Approvals

3.4.1 Developer shall obtain and pay for all necessary Governmental Approvals, as required by the Comprehensive Agreement and the Technical Requirements.

3.4.2 Developer shall provide reasonable assistance to Design-Builder in obtaining those Governmental Approvals that are Design-Builder's responsibility.

3.5 Developer's Separate Contractors

3.5.1 The Developer may at any time contract or approve concurrent contracts for performance of other work on, near, or within the same geographical area of the work specified in an existing contract. Design-Builder shall not impede or limit access to such work by others.

3.5.2 When separate contracts are awarded within the limits of one project, contractors shall not hinder the work being performed by other contractors. Design-Builder(s) and/or Separate Contractor(s) working on the same project shall cooperate with each other. In case of dispute, the Developer's Representative will be the referee, and his decision will be binding on all parties.

3.5.3 When contracts are awarded to Design-Builder(s) and/or Separate Contractor(s) for known concurrent construction in a common area, the Design-Builder(s) and/or Separate Contractor(s), in conference with the Developer's Representative, shall establish a written joint schedule of operations. The schedule shall be based on the limitations of the individual contracts and the joining of the work of one contract with the others. The schedule shall set forth the approximate dates and sequences for the several items of work to be performed and shall ensure completion within the contract time limit. The schedule shall be submitted to the Developer's Representative for review and approval no later than twenty-one (21) days after the award date of the later contract and prior to the first monthly progress meeting. The schedule shall be agreeable to, signed by, and binding on each Design-Builder(s) and/or Separate Contractor(s).

The Developer's Representative may allow modifications of the schedule when benefit to the Design-Builder(s) and/or Separate Contractor(s) and the Developer will result.

3.5.4 Any modification of the schedule shall be in writing, mutually agreed to and signed by the Design-Builder(s) and/or Separate Contractor(s), and shall be binding on the Design-Builder(s) and/or Separate Contractor(s) in the same manner as the original agreement.

3.5.5 If the Design-Builder(s) and/or Separate Contractor(s) fail to agree on a joint schedule of operations, they shall submit their individual schedules to the Developer's Representative, who will prepare a schedule that will be binding on each Design-Builder and/or Separate Contractor.

3.5.6 The joint schedule and any modification thereof shall become a part of each contract involved. The failure of any Design-Builder and/or Separate Contractor to abide by the terms of the joint schedule will be justification for declaring the Design-Builder and/or Separate Contractor in default of his contract.

3.5.7 Each Design-Builder and/or Separate Contractor shall assume all liability, financial or otherwise, in connection with his contract and shall protect and save harmless the Commonwealth from any and all damages and claims that may arise because of any inconvenience, delay, or loss he experiences as a result of the presence and operations of other Design-Builder(s) and/or Separate Contractor(s) working in or near the work covered by his contract. He shall also assume all responsibility for any of his work not completed because of the presence or operation of other Design-Builder(s) and/or Separate Contractor(s).

3.5.8 Except for an extension of the contract time limit, Developer will not be responsible for any inconvenience, delay, or loss experienced by the Design-Builder and/or Separate Contractor as a result of his failure to gain access to the work at the time contemplated. When the failure to gain access is not due to any fault or negligence of the Design-Builder and/or Separate Contractor, an extension of the contract time limit will be allowed on the basis of the amount of time delayed.

3.5.9 The Developer will not assume any responsibility for acts, failures, or omissions of one Design-Builder and/or Separate Contractor that delay the work of another except as provided herein.

Article 4

Hazardous Environmental Conditions and Differing Site Conditions

4.1 Hazardous Environmental Conditions

4.1.1 General Obligations

.1 Unless specifically stated to the contrary in the Technical Requirements, Design-Builder will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Environmental Conditions that are encountered on, in or under the Site.

.2 Design-Builder shall notify the Developer prior to implementing any Remedial Actions contained in Design-Builder's Environmental Management Plan for Known Pre-Existing Hazardous Materials.

.3 If Design-Builder encounters any Unknown Pre-Existing Hazardous Materials the presence of which constitutes a Hazardous Environmental Condition, then Design-Builder will promptly notify Developer and, in consultation with the Developer, will develop a Remedial Action Plan setting out the scope of the Remedial Actions that Design-Builder proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Materials and submitting copies of such data and reports to Developer for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Materials, (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Developer approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Materials and (v) timely informing Developer of all such actions.

.4 Before any Remedial Actions for Unknown Pre-Existing Hazardous Materials are taken that would inhibit Developer's ability to ascertain the nature and extent of the Hazardous Environmental Condition, Design-Builder will afford Developer the opportunity to inspect areas and locations that require Remedial Actions; *provided*, that in the case of a sudden release of any Unknown Pre-Existing Hazardous Materials, Design-Builder may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify Developer of the sudden release and its location.

.5 Design-Builder will obtain all Governmental Approvals relating to all Remedial Actions. Design-Builder will be solely responsible for compliance with such Governmental Approvals and applicable Legal Requirements concerning or relating to Hazardous Materials. In carrying out Remedial Actions that are compensable by Developer pursuant to Section 4.1.2, Design-Builder will not take any steps or actions which impair Developer's potential claims for indemnity and contribution, statutory or otherwise.

.6 Unless directed otherwise by Developer, Design-Builder will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that led to the need for Remedial Action. Without limiting the preceding sentence, Design-Builder will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund (VPSTF) for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 4.1.1.6.

.7 Except as provided in Section 4.1.2 below, Design-Builder will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Legal

Requirements and obtaining and complying with Governmental Approvals pertaining to Hazardous Materials, and otherwise of carrying out Remedial Actions.

4.1.2 Pre-Existing Hazardous Materials and Third-Party Hazardous Substances

.1 Developer will reimburse, to the extent permitted by the Legal Requirements, Design-Builder for Design-Builder's costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Materials and Third-Party Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition.

.2 Developer will assume, to the extent permitted by the Legal Requirements, responsibility for third-party claims against Design-Builder for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Materials; except to the extent Design-Builder is obliged to indemnify Developer and the Department pursuant to Section 4.1.3 below.

.3 Design-Builder will provide cost estimates with respect to such Remedial Actions which may be reimbursed by Developer, for Developer's review and approval prior to proceeding with any such Remedial Actions, subject to Section 4.1.1.3 above.

.4 Developer reserves the right to perform Remedial Actions for Unknown Pre-Existing Hazardous Materials in lieu of, and as replacement for, Design-Builder's Remedial Action obligations subject to Section 4.1.1.2 above.

.5 Design-Builder will be entitled to submit to Developer a request for a Delay Event in accordance with the Comprehensive Agreement, to an adjustment in its Contract Price and/or Contract Time(s) to the extent Design-Builder's cost and/or time of performance have been adversely impacted by the presence, removal or remediation of Third-Party Hazardous Substances that constitute a Hazardous Environmental Condition.

4.1.3 Design-Builder's Indemnification Obligations Regarding Hazardous Materials

.1 Design-Builder will indemnify, protect, defend and hold harmless and release Developer and each State Indemnitee from and against any and all claims against Developer and/or State Indemnitees by a person not party to the Agreement, including reasonable attorney's fees, expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(A) Hazardous Materials introduced to or brought onto the Site by Design-Builder or its Subcontractors;

(B) failure of Design-Builder or any of its Subcontractors to comply with any requirement of the Contract Documents relating to Hazardous Materials (including any failure to perform any Remedial Action required in accordance with Section 4.1.1 above)

or to otherwise comply with applicable Legal Requirements and Governmental Approvals; or

(C) the exacerbation, release, spreading, migration, or toxicity of Hazardous Materials due to the negligence, omission, recklessness, or willful misconduct of Design-Builder or any of its Subcontractors.

.2 Design-Builder shall defend such claims in accordance with Article 7 below.

.3 Design-Builder's obligations under this Section 4.1.3 will not apply to claims to the extent caused by the negligence, recklessness, or willful misconduct of Developer or any State Indemnitee.

4.2 Inspection of Site Conditions

4.2.1 Design-Builder represents and warrants that it has, as of the Agreement Date, ascertained the nature and location of the Design-Build Work, the character and accessibility of the Site, the existence of obstacles to construction, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface conditions, and other general and local conditions (including labor) which might affect its performance of the Design-Build Work or the cost thereof.

4.2.2 Design-Builder will, after its receipt of Developer's Notice to Proceed, undertake such testing, inspections and investigations as may be necessary to perform its obligations under the Contract Documents, including but not limited to additional geotechnical evaluations or Hazardous Materials studies. All reports or analyses generated by Design-Builder's testing, inspections and investigations, including but not limited to additional geotechnical testing, shall be furnished to Developer promptly after such reports or analyses are generated.

Article 5 **Insurance and Bonds**

5.1 Design-Builder's Insurance Requirements

5.1.1 Design-Builder shall procure and maintain the insurance coverages required to be maintained by the Design-Builder pursuant to Exhibit V to the Comprehensive Agreement.

5.2 Bonds and Other Performance Security [*Note to Proposers – the Department will conform this section based on approach in Comprehensive Agreement and industry feedback.*]

5.2.1 Design-Builder shall procure performance and payment bonds executed by a surety acceptable to Developer and the Department, each in the amount of **[•]** of the Contract Price, and in accordance with all other requirements of the Contract Documents.

5.2.2 If the Design-Builder is structured as a limited liability company, partnership or joint venture, the bonding approach used will ensure that the members of such organizations will have

joint and several liability for the performance of the Design-Build Work required for the Project. A single [•] performance bond and a single [•] payment bond shall be provided regardless of any co-surety relationship.

Article 6 **Payment**

6.1 Schedule of Payments

6.1.1 Design-Builder shall submit to Developer, for its review and approval, and as part of its submission of the Preliminary Schedule and the Baseline Schedule under Section 11.1 of the Agreement, the Earned Value Schedule indicating the Design-Builder's anticipated monthly earnings schedule in accordance with Exhibit 11.1 of the Agreement (Special Provision for Design-Build Schedules) Developer reserves the right to withhold approval for all or part of Design-Builder's Applications for Payment until such time Design-Builder furnishes an approved Preliminary Schedule and subsequent Baseline Schedule.

6.1.2 The parties agree that progress payments for Design-Build Work performed prior to Developer's approval of the Baseline Schedule is based on the Earned Value Schedule in the approved Preliminary Schedule.

6.1.3 Neither the Earned Value Schedule included in the Design-Builder's Baseline Schedule nor payments made under Section 6.1.2 above shall exceed the monthly payment schedule included in the Initial Baseline Schedule, unless Developer specifically approves this in writing.

6.2 Monthly Progress Payments

6.2.1 On the tenth (10th) day of each month, Design-Builder shall submit for Developer's review and approval its Application for Payment requesting payment for all Design-Build Work performed as of the first day of such month and coinciding with the progress reflected in the monthly Baseline Schedule update. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.2 hereof. Payment shall be made in accordance with the following earned value calculation:

.1 Design-Builder shall identify each activity, and the value in dollars of such activity, in accordance with Section 6.1.1 above. Applications for Payment shall be made based on the following earned values.

.1 Design-Builder shall earn twenty percent (20%) of the value of an activity upon initiation of the respective activity.

.2 Design-Builder shall earn eighty percent (80%) of the value of an activity upon completion of the respective activity.

.2 QA/QC shall be an integral part of each activity. As part of each Application for Payment that includes completed activities, Design-Builder's designated quality assurance manager shall: (a) verify that the design included in each activity has been completed in accordance with the Contract Documents; (b) certify that the construction included in each activity has been completed in accordance with the Contract Documents; and (c) certify that all required QA/QC tests, measurements, permits or other requirements have been completed and all non-conformance reports relative to the respective activity have been resolved. The Design-Builder shall submit with the Application for Payment evidence of the QA/QC reviews, including any checklists, summary data, high-level/outline calculations or design checks, and evaluations of the work and the qualifications of the responsible personnel that completed the work, etc., that the relevant QA or QC reviewer relied on to make its determination the work is complete and conforms to the requirements of the Contract Documents.

6.2.2 The Application for Payment may request payment for equipment and materials not yet incorporated into the Project, provided that: (i) Developer, in its sole discretion, agrees that it is willing to allow payment for such equipment and materials; (ii) Developer is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location; (iii) the equipment and materials are protected by suitable insurance; and (iv) upon payment, Developer will receive the equipment and materials free and clear of all liens and encumbrances.

6.2.3 The Application for Payment shall constitute Design-Builder's representation that the Design-Build Work has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all Design-Build Work will pass to Developer free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Design-Build Work into the Project, or upon Design-Builder's receipt of payment, whichever occurs earlier.

6.3 Withholding of Payments

6.3.1 On or before the date established in the Agreement, Developer shall pay Design-Builder all amounts properly due. If Developer determines that Design-Builder is not entitled to all or part of an Application for Payment, it will notify Design-Builder in writing at least seven (7) days prior to the date payment is due. The notice shall indicate the specific amounts Developer intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Developer's concerns. Design-Builder and Developer will attempt to resolve Developer's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof.

6.3.2 Notwithstanding anything to the contrary in the Contract Documents, Developer shall pay Design-Builder all undisputed amounts in an Application for Payment within the times required by the Agreement.

6.4 Right to Stop Work and Interest

6.4.1 If Developer wrongfully fails to pay Design-Builder any amount that becomes due, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Design-Build Work pursuant to Section 11.1 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

6.5 Design-Builder's Payment Obligations

6.5.1 Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Developer on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Developer, the Department and the other State Indemnitees against any claims for payment and mechanic's liens as set forth in Section 7.2.1 hereof.

6.6 Acceptance

6.6.1 Until Final Acceptance of the Design-Build Work by the Developer in accordance with the requirements of this Section, the Design-Builder shall have charge and care thereof and shall take every precaution against damage to any part thereof by action of the elements or from any other cause. The Design-Builder shall rebuild, repair, restore, and make good on damage to any portion of the Design-Build Work occasioned by any of the foregoing causes before Final Acceptance and shall bear the expense thereof.

In case of suspension of work, the Developer shall issue instructions and directions to the Design-Builder as to the implementation of the suspension, which may include directing Design-Builder to develop a maintenance and transition plan. Unless specifically directed otherwise by the Developer, Design-Builder shall, during the suspension period, continue to have full responsibility for the Project, including but not limited to its obligations to take such precautions as may be necessary to prevent damage to the Design-Build Work, comply with Governmental Approvals, and ensure public safety. Such obligations include, but are not limited to, erosion control and drainage and erection of any necessary Temporary Structures, signs, or other facilities.

6.6.2 Design-Builder shall notify Developer when it believes the Design-Build Work, or to the extent permitted in the Contract Documents, a portion of the Design-Build Work, is finally complete. Within seven (7) days of Developer's receipt of Design-Builder's notice, along with a certification for the QA Manager that such Design-Build Work is finally complete, Developer and Design-Builder will jointly inspect such Design-Build Work to verify that such Design-Build Work is finally complete in accordance with the requirements of the Contract Documents. If Developer concludes that the applicable Design-Build Work is not finally complete, it will so advise the Design-Builder, whereupon the preceding process will continue until the Developer agrees that the applicable Design-Build Work is finally complete. Once the Design-Build Work is approved by the Department and determined to be finally complete, the Design-Builder will be notified in writing of the determination of Final Acceptance.

6.6.3 Upon notification of Final Acceptance, Design-Builder will provide Developer with a final Application for Payment. Developer shall make final payment by the time required in the Agreement. At the time of submission of its final Application for Payment, Design-Builder shall provide the following information:

.1 an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Design-Build Work which will in any way affect Developer's interests;

.2 a general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to Developer and remaining unsettled at the time of final payment, which claims shall be specifically listed in an attachment to the general release;

.3 consent of Design-Builder's surety to final payment;

.4 all operating manuals, warranties and other deliverables required by the Contract Documents, including the project records required by Section 11.1.9 of the Agreement; and

.5 certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

6.6.4 Upon making final payment, Developer waives all claims against Design-Builder except claims relating to: (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Developer's interests; (ii) Design-Builder's failure to complete the Design-Build Work consistent with the Contract Documents, including defects appearing after final payment; and (iii) the terms of any special warranties and indemnifications required by the Contract Documents.

Article 7 **Indemnification**

7.1 Patent and Copyright Infringement

7.1.1 Design-Builder shall defend any action or proceeding brought against Developer or any State Indemnitee based on any claim that the Design-Build Work, or any part thereof, or the operation or use of the Design-Build Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. The Developer or State Indemnitee shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder shall indemnify and hold harmless Developer and State Indemnitees from and against all damages and costs, including but not limited to attorneys' fees and expenses awarded against Developer or State Indemnitees or Design-Builder in any such action or proceeding. Design-Builder agrees to keep the Developer and State Indemnitees informed of all developments in the defense of such actions.

7.1.2 If a Developer or State Indemnitee is enjoined from the operation or use of the Design-Build Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Design-Build Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense: (i) modify the Design-Build Work so as to avoid infringement of any such patent or copyright; or (ii) replace said Design-Build Work with work that does not infringe or violate any such patent or copyright.

7.1.3 Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright: (i) relating solely to a particular process or product of a particular manufacturer specified by Developer and not offered or recommended by Design-Builder to Developer; or (ii) arising from modifications to the Design-Build Work by Developer after acceptance of the Design-Build Work.

7.2 Payment Claim Indemnification

7.2.1 Providing that Developer is not in breach of its contractual obligation to make payments to Design-Builder for the Design-Build Work, Design-Builder shall indemnify, defend and hold harmless Developer and the State Indemnitees from any claims or mechanic's liens brought against Developer or any State Indemnitee or against the Project as a result of the failure of Design-Builder, or those for whose acts it is responsible, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Design-Build Work. Within three (3) days of receiving written notice from Developer or a State Indemnitee that such a claim or mechanic's lien has been filed, Design-Builder shall commence to take the steps necessary to discharge said claim or lien, including, if necessary, the furnishing of a mechanic's lien bond. If Design-Builder fails to do so, Developer and the State Indemnitee will have the right to discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorneys' fees.

7.3 Design-Builder's General Indemnification

7.3.1 Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Developer and the State Indemnitees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for: (i) bodily injury, sickness or death, and property damage or destruction (other than to the Design-Build Work itself) to the extent resulting from the negligent acts, errors, omissions, or reckless or intentional wrongful conduct of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable; and (ii) any violation of Sections 2.5, 2.6, or 2.8 hereof by Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.

7.3.2 If an employee of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable, has a claim against Developer and/or a State Indemnitee, Design-Builder's indemnity obligation set

forth in Section 7.3.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

7.4 Defense and Indemnification Procedures

7.4.1 If Developer receives notice of or otherwise has actual knowledge of a claim which it believes is within the scope of Design-Builder's indemnification under the Contract Documents, it shall by writing as soon as practicable: (i) inform Design-Builder of such claim; (ii) send to Design-Builder a copy of all written materials Developer has received asserting such claim and (iii) notify Design-Builder that either: (i) the defense of such claim is being tendered to Design-Builder; or (ii) Developer has elected to conduct its own defense for a reason set forth below.

7.4.2 If the insurer under any applicable insurance policy accepts tender of defense, Design-Builder and Developer shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then the following provisions shall apply.

7.4.3 If the defense is tendered to Design-Builder, it shall within forty-five (45) days of said tender deliver to Developer a written notice stating that Design-Builder: (i) accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter; (ii) accepts the tender of defense but with a "reservation of rights" in whole or in part; or (iii) rejects the tender of defense if it reasonably determines it is not required to indemnify against the claim under the Contract Documents. If such notice is not delivered within such forty-five (45) days, the tender of defense shall be deemed rejected.

7.4.4 If Design-Builder accepts the tender of defense, Design-Builder shall have the right to select legal counsel for Developer and/or the State Indemnitees, subject to reasonable approval of Developer, or to a State Indemnitee of the State Attorney General, and Design-Builder shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense: (i) Design-Builder shall at Design-Builder's expense, fully and regularly inform Developer of the progress of the defense and of any settlement discussions; and (ii) Developer shall, at Design-Builder's expense for all of Developer's reasonable out-of-pocket third party expenses, fully cooperate in said defense, provide to Design-Builder all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to Developer and maintain the confidentiality of all communications between it and Design-Builder concerning such defense to the extent allowed by law.

7.4.5 Developer shall be entitled to select its own legal counsel and otherwise control the defense of such claim if: (i) the defense is tendered to Design-Builder and it refuses the tender of defense, or fails to accept such tender within forty-five (45) days, or reserves any right to deny or disclaim such full indemnification thereafter; or (ii) Developer, at the time it gives notice of the

claim or at any time thereafter, reasonably determines that: (i) a conflict exists between it and the Design-Builder which prevents or potentially prevents Design-Builder from presenting a full and effective defense; or (ii) Design-Builder is otherwise not providing an effective defense in connection with the claim and Design-Builder lacks the financial capability to satisfy potential liability or to provide an effective defense. Developer may assume its own defense pursuant to the above by delivering to Design-Builder written notice of such election and the reasons therefore.

7.4.6 If Developer is entitled and elects to conduct its own defense pursuant hereto, all reasonable costs and expenses it incurs in investigating and defending and claim for which it is entitled to indemnification hereunder (and any settlements or judgments resulting therefrom) shall be reimbursed by Design-Builder after completion of the proceeding.

7.4.7 If Developer is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the claim with the Design-Builder's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of the Design-Builder's indemnity. Notwithstanding the foregoing, if the Developer elects to conduct its own defense and it is later determined that no indemnification obligation existed as to the particular claim, the Developer shall pay its own costs and expenses relating thereto. In addition, if the Developer elects to conduct its own defense because it perceives a conflict of interest, the Developer shall pay its own costs and expenses relating thereto.

Article 8 **Time**

8.1 Obligation to Achieve the Contract Times

8.1.1 Design-Builder agrees that it will commence performance of the Design-Build Work and achieve the Contract Time(s) in accordance with Article 5 of the Agreement.

8.2 Delays Events

8.2.1 If Design-Builder is delayed in the performance of the Design-Build Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own, Subcontractors, Design Consultants, or those for whom Design-Builder, Subcontractors, or Design Consultants are responsible, Design-Builder may submit a Delay Event Notice that complies with Article 13 of the Comprehensive Agreement.

8.2.2 Notwithstanding the right of Design-Builder to receive a time extension pursuant to Section 8.2.1, Design-Builder agrees that if it encounters an excusable delay, it will, if directed by Developer, develop and implement a recovery schedule and plan to improve progress and take such measures to overcome such delay.

8.3 Compensation Events

8.3.1 If Design-Builder believes a Compensation Event (as such term is defined in Exhibit A to the Comprehensive Agreement) has occurred with respect to the Design-Build Work, the Design-Builder may submit to Developer a Compensation Event Notice that complies with Article 14 of the Comprehensive Agreement.

8.4 Schedule Impact Analysis for Proposed Time Extensions

8.4.1 If Design-Builder claims that any event, including but not limited to a change in the Design-Build Work, justifies an extension to the Contract Time(s), Design-Builder shall submit to Developer a written analysis of such delay in accordance with the procedure set forth in the Technical Requirements.

Article 9 **Changes to the Contract Price and Time**

9.1 Work Orders

9.1.1 A **Work Order** (change order), is a written instrument issued after the Agreement Date signed by Developer and Design-Builder, stating their agreement upon all of the following:

- .1** The scope of the change in the Design-Build Work;
- .2** The amount of the adjustment to the Contract Price; and
- .3** The extent of the adjustment to the Contract Time(s).

9.1.2 All changes in the Design-Build Work authorized by applicable Work Order shall be performed under the applicable conditions of the Contract Documents. Developer and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

9.1.3 If Developer requests a proposal for a change in the Design-Build Work from Design-Builder and subsequently elects not to proceed with the change, a Work Order shall be issued to reimburse Design-Builder for reasonable costs incurred for estimating services, design services and services involved in the preparation of proposed revisions to the Contract Documents.

9.2 Contract Change Directive

9.2.1 A **Contract Change Directive** (CCD) is a written order prepared and signed by Developer, directing a change in the Design-Build Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time(s).

9.2.2 Developer and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for the Contract Change Directive. Upon reaching an

agreement, the parties shall prepare and execute an appropriate Work Order reflecting the terms of the agreement.

9.2.3 The Developer may issue a CCD by unilateral Work Order, subject further to the terms of Section 9.4.1.3.

9.3 Minor Changes in the Work

9.3.1 Minor changes in the Design-Build Work do not involve an adjustment in the Contract Price and/or Contract Time(s) and do not materially and adversely affect the Design-Build Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Design-Build Work consistent with the intent of the Contract Documents, provided, however that Design-Builder shall promptly inform Developer and the QAM, in writing, of any such changes and record such changes on the documents maintained by Design-Builder.

9.4 Contract Price Adjustments

9.4.1 The increase or decrease in Contract Price resulting from a change in the Design-Build Work shall be determined by one or more of the following methods:

.1 Unit prices set forth in the Agreement or as subsequently agreed to between the parties;

.2 A mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Developer;

.3 Costs, fees and any other markups set forth in accordance with Section 109.05 of the Division 1 Amendments; and

.4 If an increase or decrease cannot be agreed to as set forth in items .1 through .3 above and Developer issues a Contract Change Directive, the cost of the change of the Design-Build Work shall be determined by the reasonable expense and savings in the performance of the Design-Build Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement. If the net result of both additions and deletions to the Design-Build Work is an increase in the Contract Price, overhead and profit shall be calculated on the basis of the net increase to the Contract Price. If the net result of both additions and deletions to the Design-Build Work is a decrease in the Contract Price, there shall be no overhead or profit adjustment to the Contract Price. Design-Builder shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.

9.4.2 If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Developer or Design-Builder because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted. Design-Builder shall bear the burden of proving that there is a substantial inequity in the unit rates.

9.5 Emergencies

9.5.1 In any emergency affecting the safety of persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time(s) on account of emergency work shall be determined as provided in this Article 9.

Article 10 **Contract Adjustments and Disputes**

10.1 Requests for Contract Adjustments and Relief

10.1.1 If Design-Builder believes that it is entitled to an adjustment to the Contract Price or Contract Times or other relief for any occurrence arising out of or related to the Design-Build Work or Project, including the acts or omissions of the Developer, it shall submit a written request to Developer stating the basis for such Contract Price or Contract Time adjustment or relief. Such request shall be submitted: (a) prior to Design-Builder incurring any cost or expense, or performing any work on which the request is based; and (b) in accordance with any specific requirements contained in applicable sections of these General Conditions of Contract or, absent any specific requirement, then within a reasonable time, not to exceed [•], after the time of the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief or after Design-Builder reasonably should have recognized the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief, whichever is later. Such request shall include sufficient information to advise Developer of the facts and circumstances giving rise to the request for Contract Price or Contract Time adjustment or relief, the specific contractual adjustment or relief requested and the basis for Design-Builder's entitlement to the adjustment or relief.

10.2 Dispute Avoidance and Resolution

10.2.1 The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes and disagreements. If disputes or disagreements do arise, Design-Builder and Developer each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Design-Build Work.

10.2.2 Design-Builder and Developer will first attempt to resolve all disputes or disagreements at the field level through best efforts and good faith negotiations between Design-Builder's Representative and Developer's Representative. If the dispute or disagreement cannot be resolved through Design-Builder's Representative and Developer's Representative, Design-Builder's Senior Representative and Developer's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than [•] days after such a request is made, to attempt to resolve such dispute or disagreement. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving the dispute or disagreement. If the Senior Representatives

determine that the dispute or disagreement cannot be resolved to the mutual satisfaction of both parties, despite their best efforts, then [•].

10.3 Duty to Continue Performance

10.3.1 Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Design-Build Work and Developer shall continue to satisfy its payment obligations to Design-Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Developer.

10.4 CONSEQUENTIAL DAMAGES

10.4.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 10.4.2 BELOW), NEITHER DESIGN-BUILDER NOR DEVELOPER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

10.4.2 The consequential damages limitation set forth in Section 10.4.1 above will not affect the payment of liquidated damages set forth in Article 5 of the Agreement, which both parties recognize has been established, in part, to reimburse Developer for some damages that might otherwise be deemed to be consequential.

Article 11

Stop Work and Termination for Cause

11.1 Developer's Right to Stop Work

11.1.1 Developer may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Design-Build Work. Such suspension shall not exceed [•] consecutive days or aggregate more than [•] days during the duration of the Project.

11.1.2 Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Time(s) if its cost or time to perform the Design-Build Work has been adversely impacted by any suspension or stoppage of work by Developer, by requesting a Work Order.

11.2 Developer's Right to Perform and Terminate for Cause

11.2.1 If Design-Builder persistently fails to do any of the following:

- .1** begin the Design-Build Work upon receipt of Notice to Proceed;
- .2** provide a sufficient number of skilled workers, equipment, or supply the materials required by the Contract Documents;

- .3 comply with applicable Legal Requirements;
- .4 timely pay, without cause, Design Consultants or Subcontractors;
- .5 prosecute the Design-Build Work with promptness and diligence to ensure that the Design-Build Work is completed by the Contract Time(s), as such times may be adjusted; or
- .6 perform material obligations under the Contract Documents;

then Design-Builder may be declared in default and Developer, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Section 11.2.2 below.

11.2.2 If any of the conditions set forth in Section 11.2.1 above exists, Developer will give written notice to Design-Builder and its surety of the condition. If, within ten (10) days after such notice, Design-Builder or its surety fails to cure, or reasonably commence to cure, such condition to the satisfaction of Developer, then Developer may then, or at any time thereafter, send a second written notice to Design-Builder declaring Design-Builder in default. Upon declaring Design-Builder in default, Developer shall have the right, among other things, to terminate this Agreement for default.

11.2.3 Upon terminating this Agreement for default, Developer will have the right to, in addition to any other right available at law, take possession, for the purpose of completing the Design-Build Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Design-Build Work, all of which Design-Builder hereby transfers, assigns and sets over to Developer for such purpose, and to employ any person or persons to complete the Design-Build Work and provide all of the required labor, services, materials, equipment and other items. Design-Builder specifically agrees that it will assign all Subcontractors and Design Consultants to Developer, upon Developer's written demand that it do so. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until the Design-Build Work shall be finally completed in accordance with the Contract Documents. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Developer in completing the Design-Build Work, such excess shall be paid by Developer to Design-Builder. If Developer's cost and expense of completing the Design-Build Work exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Developer. Such costs and expense shall include not only the cost of completing the Design-Build Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Developer in connection with the procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 10.4 hereof.

11.2.4 If Developer improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 8 of the Agreement.

11.2.5 Developer shall have the right, upon the occurrence of any of the conditions set forth in Section 11.2.1 above, and regardless of whether or not Design-Builder is declared in default and/or terminated, to communicate with Design-Builder's surety and compel such surety to cure such conditions.

11.3 Design-Builder's Right to Stop Work

11.3.1 Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop work for the following reasons:

.1 Developer's failure to provide financial assurances as required under Section 3.2 hereof; or

.2 Developer's failure to pay amounts properly due under Design-Builder's Application for Payment.

11.3.2 Should any of the events set forth in Section 11.3.1 above occur, before exercising its rights under this section, Design-Builder shall provide Developer with written notice that Design-Builder will stop work unless said event is cured within ten (10) days from Developer's receipt of Design-Builder's notice. If Developer does not cure the problem within such ten (10) day period, Design-Builder may stop work. In such case, Design-Builder shall be entitled to make a claim for adjustment to the Contract Price and Contract Time(s) to the extent it has been adversely impacted by such stoppage.

11.4 Design-Builder's Right to Terminate for Cause

11.4.1 Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Agreement for cause for the following reasons:

.1 The Design-Build Work has been stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, because of court order, any Governmental Unit having jurisdiction over the Design-Build Work, or orders by Developer under Section 11.1.1 hereof, provided that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible.

.2 Developer's failure to provide Design-Builder with any information, permits or approvals that are Developer's responsibility under the Contract Documents which result in the Design-Build Work being stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, even though Developer has not ordered Design-Builder in writing to stop and suspend the Design-Build Work pursuant to Section 11.1.1 hereof.

.3 Developer's failure to cure the problems set forth in Section 11.3.1 above after Design-Builder has stopped the Design-Build Work.

11.4.2 Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Developer that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within ten (10) days of Developer's receipt of such notice. If Developer fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Developer of its intent to terminate within an additional ten (10) day period. If Developer, within such second ten (10) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Developer of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Developer had terminated the Agreement for its convenience under Article 8 of the Agreement.

11.5 Bankruptcy of Design-Builder

11.5.1 If Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code, such event may impair or frustrate Developer's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

.1 Design-Builder, its trustee or other successor, shall furnish, upon request of Developer, adequate assurance of the ability of Design-Builder to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

.2 Design-Builder shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If Design-Builder fails to comply with its foregoing obligations, Developer shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to Developer under this Article 11.

11.5.2 The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of Developer to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code. It shall also not limit the ability of Developer to seek recourse against Design-Builder's surety, who shall be obligated to perform notwithstanding the bankruptcy proceedings against Design-Builder.

Article 12 **Miscellaneous**

12.1 Assignment

12.1.1 Design-Builder shall not, without the prior written consent of Developer (which consent may be withheld or denied for any reason), assign, transfer or sublet any portion or part of the Design-Build Work or the obligations required by the Contract Documents.

12.2 Successorship

12.2.1 Design-Builder and Developer intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

12.3 Governing Law

12.3.1 The Agreement and all Contract Documents shall be governed by the laws of the Commonwealth of Virginia, without giving effect to its conflict of law principles.

12.4 Severability

12.4.1 If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

12.5 No Waiver

12.5.1 The failure of either Design-Builder or Developer to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

12.6 No Third-Party Beneficiary Status

12.6.1 Nothing under the Contract Documents shall afford any third party to this Agreement, including members of the public, third-party beneficiary status hereunder.

12.7 Headings

12.7.1 The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

12.8 Notice

12.8.1 Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given: (i) if delivered in person to the individual intended to receive such notice; (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement; or (iii) if transmitted by facsimile, by the time stated in a machine generated confirmation that notice was received at the facsimile number of the intended recipient, provided, however, that the intended recipient is present to

receive the facsimile and the transmittal is immediately followed by a hard copy delivered in accordance with (i) or (ii) above.

12.9 Amendments

12.9.1 The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

12.10 Exhibits

12.10.1 The following exhibits, as well as any other exhibits specifically set forth in Exhibit _____ (Project Specific Terms), are made part of, and incorporated into these General Conditions of Contract:

[•]

12.11 Department

12.11.1 The parties understand, agree and acknowledge that the Agreement is solely by and between Developer and Design-Builder, and neither the Virginia Department of Transportation nor any other State Indemnitee shall have any obligation or liability to Design-Builder hereunder or otherwise in connection with the Project. All amounts owing or to become owing to Design-Builder, whether as part of the Contract Sum, under a Change Order, pursuant to a Contract Change Directive, asserted as a Claim, or otherwise arising out of or resulting from the Design-Build Work or the Project, are the responsibility of Developer and not of the Virginia Department of Transportation or any other State Indemnitee.

12.11.2 Approvals and reviews by the Department are for the benefit of the Department, and no review, approval, acceptance or other action (or inaction) by the Department shall reduce, or effect or imply satisfaction of, any duty, responsibility or obligation of Developer or of Design-Builder.

12.11.3 Neither the Agreement nor the other Contract Documents include the concept of “substantial completion” or a “substantial completion date”, the obligations and requirements being to satisfy the applicable Interim Milestone Completion Dates and the Final Completion Date. The achievement of “substantial completion” shall not satisfy Design-Builder’s obligations under the Agreement, the Baseline Schedule, the Earned Value Schedule or otherwise.

12.11.4 The parties acknowledge that certain Contract Documents and Exhibits used in connection with the Agreement are those utilized on and applicable to State Highway projects generally, and as such contain references therein to the “Department” as if the Department were a party thereto (even though it is not). The terms and provisions of such documents shall be applicable to this Agreement and the other Contract Documents and Exhibits, and shall be read and interpreted as if all references there in to “Department” were written as “Developer” except only in those instances where there is applied (i) a governmental function,

(ii) a legal limitation as to (or against) the Department, or (iii) a statute pertaining to the Department.